IN THE

Supreme Court of the United States

October Term, 1979

No. 79-367

STANLEY ROBERT RAPPAPORT,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Preliminary Statement

Petitioner Stanley Robert Rappaport testified before a New York County Grand Jury investigating official corruption on July 13, 14, and 23, 1976. As a result of giving evasive answers, he was indicted for CRIMINAL CONTEMPT IN THE FIRST DEGREE, in violation of Penal Law Section 215.51.

The indictment was dismissed on November 30, 1976 by Justice Harold J. Rothwax, sitting in Supreme Court, New York County, on the grounds that Rappaport had not been warned that he was committing evasive contempt while he was in the act of answering evasively. Justice Rothwax's decision was reversed by the Supreme Court, Appellate Division, First Department, on December 27, 1977, and the indictment was ordered reinstated. *People* v. *Rappaport,* 60 A.D.2d 565, 400 N.Y.S.2d 351 (1st Dept. 1977). The order of the Appellate Division was affirmed by the New York Court of Appeals on June 7, 1979. *People* v. *Rappaport,* 47 N.Y.2d 308, 418 N.Y.S.2d 306 (1979). Petitioner now seeks a writ of certiorari to review the decision of the New York Court of Appeals.

The Proceedings Below

The Grand Jury Investigation

The New York County Grand Jury was investigating whether a pending divorce action had been corruptly influenced by the husband and those acting on his behalf. Rappaport, an auctioneer who had been appointed to liquidate some of the property owned by the divorcing couple, was called before the Grand Jury and questioned concerning certain statements he had allegedly made to the wife and her attorney indicating that the case had been "fixed." It was Rappaport's evasive answers to these questions which led to his indictment for criminal contempt

Rappaport testified before the Grand Jury on July 13, 14, and 23, 1976. By appearing as a witness, he automatically received transactional immunity pursuant to New

York Criminal Procedure Law Section 190.40. Prior to examining Rappaport on July 13, the Assistant District Attorney explained the purpose of the Grand Jury investigation (4-5)* and the rights Rappaport had as a witness. He explained that although Rappaport had been granted immunity, he might still be prosecuted for perjury or contempt committed in the course of his testimony before the Grand Jury (9). With respect to the latter, he said:

> Q. Now, the crime of contempt may be committed in one of two ways. One way in which an immunized witness may commit the crime of contempt is to answer in response to a legal and proper interrogatory by saying, I'm not gonna tell you, I'm not gonna give you an answer or some words to that effect. Do you understand that?
>
> A. Yes, sir.
>
> Q. Now, the second way in which an immunized witness may commit the crime of criminal contempt is by giving a response to a legal and proper interrogatory that is so evasive, so equivocal, so conspicuously unbelievable and patently false as to be the same thing as saying I'm not going to answer. You understand that?
>
> A. Yes, sir.
>
> Q. Let me give you an example. Let's assume in the context of this investigation it were a legal and proper question for me to ask you did you get married last week. And let's assume that the witness to whom that question was addressed said, maybe yes, maybe no. It's possible I got married last week, and indeed it is probable I got married last week but I don't remember. That type of response to that type of question may subject that witness to prosecution for the

* Page references are to the minutes of the First July 1976 Grand Jury in the case of *The People of the State of New York* v. *Richard Roe, et al.*

crime of criminal contempt because as I am sure you'll agree that is so evasive, so equivocal and so conspicuously false that it is the same thing as saying I am not going to answer that. Now, do you understand that?

A. Yes, I do. (10-11)

Mr. Rappaport was then permitted to leave the room and confer with his attorney (13-14). When he returned, he was asked the following questions by the Assistant District Attorney:

Q. Do you have any questions whatsoever about your status as an immunized witness?

A. Very definitely not. I am prepared to testify to anything you ask.

Q. Do you understand all of the instructions given you by Mr. Brown and myself upon your initial appearance in the grand jury?

A. Yes, sir.

Q. You understand both your rights as an immunized witness and your obligations?

A. Definitely.

Q. You have no questions whatsoever?

A. No, sir.

Q. Are you prepared to proceed?

A. Definitely. (13-14)

Rappaport then proceeded to testify concerning his knowledge of possible irregularities in the divorce proceeding.

The indictment for evasive contempt arose from answers Rappaport gave on July 23, 1976, the last day of his testimony. He was asked whether, within the past two months, he had stated, in the presence of the wife and a friend of hers, that a Referee appointed in the divorce action kicked back sixty percent of his fees to persons responsible for his appointment.

Rappaport responded by stating that he did not recall whether he had made the statement in question. The question was repeated and rephrased nine separate times, and each time Rappaport answered by professing an inability to recall whether he had made the statement (219-220, 273-274). Rappaport was subsequently indicted for one count of CRIMINAL CONTEMPT IN THE FIRST DEGREE, in violation of Penal Law Section 215.51.

The Decision of Justice Harold J. Rothwax Dismissing the Indictment

Rappaport moved to dismiss the indictment, claiming *inter alia* that he had not been sufficiently warned that his answers might subject him to charges of evasive contempt. Justice Rothwax agreed, and on November 30, 1976, dismissed the indictment, stating that:

> [It] would seem that a warning, to be effective, must be delivered, not only before a witness first begins to testify, but also at a time when he still has an opportunity to cure his unresponsiveness; that is, contemporaneously with the questioning which has elicited the evasive answers. Clearly, this was not done in the instant case. (Petitioner's Appendix, pp. 12a-13a)

The Decision of the Appellate Division Reversing the Dismissal of the Indictment

On December 27, 1977, the Appellate Division, First Department, unanimously reversed the decision of Justice Rothwax, and ordered the indictment reinstated. After reviewing the explanation of evasive contempt given to

Rappaport, the various warnings concerning evasive contempt which Rappaport had received in the course of the proceedings, and Rappaport's continued affirmances that he understood his rights and obligations as an immunized witness, the Court concluded:

> Defendant argues that he was lulled into a sense of security that he was testifying properly. By what course of reasoning he arrives at that conclusion evades the mind. The District Attorney asked the same question repeatedly and the defendant cannot in good faith say that the reason for reiteration was lost on him. (Petitioner's Appendix, pp. 17a-18a)

The Decision of the Court of Appeals Affirming the Decision of the Appellate Division

On June 7, 1979, the Court of Appeals unanimously affirmed the decision of the Appellate Division reinstating the indictment, observing that although a witness should be informed that he may be prosecuted for contempt if he gives evasive answers, the prosecutor need not "repeat the admonition, or have the court direct an answer, every time the witness' testimony becomes vague or evasive." The Court noted that an admonition to the witness "is not necessary to put the witness on notice when, as here, he had been fairly, indeed generously, informed of the extent of his immunity and his continuing liability to criminal prosecution if he answers evasively." The Court concluded that Rappaport was not trapped into committing contempt "in view of the prosecutor's careful reframing and repetition of the questions and his representation, acknowledged by the witness, that the inquiry was important to the matter under investigation" (Petitioner's Appendix, pp. 7a-8a).

POINT I

The Court lacks jurisdiction to review this case because (1) the judgment of the Court of Appeals is not "final" within the meaning of 28 U.S.C. § 1257, and (2) petitioner never presented his constitutional claims to the courts of New York State as required by 28 U.S.C. § 1257.

(1) Under 28 U.S.C. § 1257, this Court has jurisdiction to review the decision of the Court of Appeals only if that decision is "final." A decision is final only if it marks an effective end to the entire litigation and not merely to an intermediate or interlocutory stage of the litigation. *Market Street Railway Company* v. *Railroad Commission of the State of California,* 324 U.S. 548, 551 (1945). The finality rule, in force since 1789, serves to protect the resources of the Court and of the litigants. In addition, when one of the litigants seeks to overturn a decision of a state court, the requirement of finality is "an important factor in the smooth working of our federal system." *Radio Station WOW, Inc.* v. *Johnson,* 326 U.S. 120, 124 (1945).

The New York Court of Appeals has not entered a "final" judgment within the meaning of 28 U.S.C. § 1257. The Court affirmed an order of the Appellate Division reinstating the indictment. Thus, the litigation between the State of New York and petitioner over the crime charged in the indictment is once again in a pre-trial phase. The fact that the litigation is still in progress renders the decision of the New York Court of Appeals non-final. The case may be disposed of by plea, acquittal, or in some other fashion which will render the issue here moot. If, ultimately, the petitioner is convicted after trial, and that convic-

tion is affirmed by the state courts, he will then be able to present his claim to this Court.

(2) The writ should be denied because petitioner failed to "specially set up or claim" a federal constitutional right in the courts of New York State, as required by 28 U.S.C. § 1257 (3). The petition for a writ of certiorari raises, for the first time, claims under the Fifth, Sixth and Fourteenth Amendments to The United States Constitution. None of these claims was presented by petitioner in his briefs submitted to the Appellate Division, First Department, or to the New York Court of Appeals. Petitioner argued his case as a matter of state law, and never alerted the Court of Appeals to the federal constitutional grounds which he now claims are involved. The decision of the Court of Appeals rests on state rather than federal grounds. As this Court observed in *Lynch* v. *New York ex rel. Pierson,* 293 U.S. 52, 54 (1934):

> It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.

Since petitioner has satisfied neither of the aforementioned requirements, the petition should be dismissed for lack of jurisdiction under 28 U.S.C. § 1257.

POINT II

Petitioner has not demonstrated sufficient reason for this Court to review the decision of the New York Court of Appeals.

The decision of the New York Court of Appeals does not present an issue of national significance warranting review by this Court. The Court of Appeals merely decided that on the facts of this particular case, petitioner had received sufficient warning that he risked evasive contempt charges by answering as he did. Petitioner has not suggested any conflict among the reported state decisions on the question of whether a witness must be warned not to commit evasive contempt while he is in the very act of testifying before the Grand Jury. Nor has petitioner suggested that the issue he raises has any national importance, or is of interest to anyone except himself.

This Court has recently reviewed the question of whether a witness testifying before the Grand Jury must be interrupted and admonished not to commit a testimonial crime. In *United States* v. *Mandujano,* 425 U.S. 564, 581-582 (1976), this Court decided that once a Grand Jury witness has sworn to give truthful answers, it would be superfluous to require the prosecutor to warn him not to commit perjury. The Court quoted with approval from *United States* v. *Winter,* 348 F.2d 204, 210 (2nd Cir. 1965):

> Once a witness swears to give truthful answers, there is no requirement to "warn him not to commit perjury, or conversely to direct him to tell the truth." It would render the sanctity of the oath quite meaningless to require admonition to adhere to it.

Since there is no need to warn a witness not to commit perjury, there should be no need to warn a witness not to

commit evasive contempt; evasive contempt is practically indistinguishable from perjury since the essence of evasive contempt is "a false and evasive profession of an inability to recall." *People* v. *Ianiello,* 36 N.Y.2d 137, 141 (1975). Whether the crime is perjury or evasive contempt, the oath taken by petitioner served the purpose of a warning —to impress upon petitioner his obligation to testify in an honest and straightforward fashion or risk prosecution. Given that the Court has recently spoken on the issue raised by petitioner, in *Mandujano,* it would serve no purpose to grant the petition.

Nor would the purposes of certiorari be served where it is clear from the record and the decisions of the appellate courts of New York State that petitioner was treated fairly in all respects. He was given a detailed explanation of evasive contempt, which he acknowledged he understood, and the critical question was put to him nine times without eliciting a responsive answer. As the Appellate Division observed, "the defendant cannot in good faith say that the reason for reiteration was lost on him."

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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